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Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. The report is part of the Working Group's ongoing global study of national laws and regulations relating to private military and security companies. The present report focuses on the laws and regulations of six countries of the Commonwealth of Independent States, four countries in the Asia and Pacific region and the United States of America in North America. The global study aims to assess existing national laws regarding private military and security companies and their effectiveness in protecting human rights and promoting accountability for violations. It also aims to identify any commonalities, good practices and regulatory gaps that may exist.

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I. Introduction

1. The present report covers the activities of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination since its previous report to the Human Rights Council (A/HRC/30/34 and Add.1). In addition, it contains the results of the Working Group's study on national legislation concerning private military and security companies in Eastern Europe, the Asia and Pacific region and North America.

2. The report is submitted pursuant to Commission on Human Rights resolution 2005/2, by which the Commission established the mandate of the Working Group, and Human Rights Council resolution 30/6, by which the Council further extended the mandate.

3. The Working Group comprises five independent experts: Patricia Arias (Chile), Elzbieta Karska (Poland), Anton Katz (South Africa), Gabor Rona (United States of America) and Saeed Mokbil (Yemen). Ms. Karska served as Chair-Rapporteur for the period January 2015 to May 2016; Ms. Arias holds the Chair until 31 October 2016.

4. For the purpose of the present report, a private military and security company is defined as "a corporate entity which provides, on a compensatory basis, military and/or security services by physical persons and/or legal entities". Military services refer to "specialized services related to military actions, including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities". Security services refer to "armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, development and implementation of informational security measures and other related activities".[1]

II. Activities of the Working Group

A. Twenty-fifth to twenty-seventh sessions of the Working Group

5. The Working Group held three sessions from 1 July 2015 to 31 to April 2016. During its twenty-fifth session, held in New York from 20 to 24 July 2015, it convened an expert panel on foreign fighters. It also met with United Nations officials on the adoption of some of its recommendations on the use of private military and security companies by the United Nations, with non-governmental organizations and with representatives of the private military and security industry.

6. At its twenty-sixth session, held in Geneva from 30 November to 4 December 2015, the Working Group convened an expert panel on private military and security companies, met with representatives of Member States on country visits and issues concerning the mandate as well as with a representative of the private military and security industry.

7. At its twenty-seventh session, held in Geneva from 11 to 15 April 2016, the Working Group convened an expert panel on foreign fighters and the evolution of mercenarism.

[1] Draft convention on private military and security companies (see A/HRC/15/25, annex).

B. Communications

8. Since its previous report to the Human Rights Council, the Working Group sent communications jointly with other special procedures mandate holders to the Governments of Australia and Nauru concerning asylum seekers detained in the latter country.[2]

C. Country visits

9. The Working Group conducted official visits to Tunisia from 1 to 8 July 2015 (A/HRC/33/43/Add.1), to Belgium from 8 to 12 October 2015 (A/HRC/33/43/Add.2), to Ukraine from 14 to 18 March 2016 (A/HRC/33/43/Add.3) and to European Union institutions from 25 to 28 April 2016 (A/HRC/33/43/Add.4).

D. Other activities of Working Group members

10. On 3 December 2015, Ms. Karska was a panellist at a public hearing in Brussels on the use of private security companies in the context of European security and defence organized by the Subcommittee on Security and Defence of the European Parliament Committee on Foreign Affairs.

11. Ms. Arias participated in an expert consultation on enforced disappearances and non-State actors in Rabat, Morocco, on 7 February 2016, organized by the Working Group on Enforced or Involuntary Disappearances and the National Human Rights Council of Morocco. She was invited by the Office of the United Nations High Commissioner for Human Rights in Guatemala to a meeting to discuss the situation of private security companies in the country, in particular the progress of related research.

12. Mr. Mokbil represented the Working Group at the Regional Conference on Private Military and Security Companies, held in Addis Ababa from 11 to 12 November 2015, co-hosted by the Swiss Federal Department of Foreign Affairs, the International Committee of the Red Cross, Addis Ababa University and the Geneva Centre for the Democratic Control of Armed Forces. He served as a panellist on the topic "Regional and international perspectives: the African Union and the work of the United Nations".

13. Mr. Rona Served as a commentator for a discussion on the domestic side of the monopoly on the use of force at an event organized by the Friedrich Ebert Foundation in New York on 10 March.

III. Research on national legislation concerning private military and security companies

A. Introduction

14. The Working Group continued its global study of national laws regarding private military and security companies to assess their effectiveness in protecting human rights and promoting accountability for violations. The study aims to identify any commonalities, good practices and regulatory gaps that may exist.

[2] Summaries of the communications will be included in a report to be submitted to the Human Rights Council at its thirty-third session.

15. The present report focuses on the laws and regulations of six countries of the Commonwealth of Independent States (Azerbaijan, Kazakhstan, Kyrgyzstan, the Republic of Moldova, Tajikistan and Uzbekistan), four countries in the Asia and Pacific region (Australia, New Zealand, Nauru and Papua New Guinea) and the United States of America in North America.[3]

16. In its 2015 report to the Human Rights Council (A/HRC/30/34), the Working Group focused on the laws and regulations of eight countries in Central America and the Caribbean,[4] eight countries in South America[5] and four countries in Western Europe.[6] In its 2014 report (A/HRC/27/50), it covered eight francophone African States[7] and eight Asian States[8] while in its 2013 report (A/HRC/24/45), it focused on 13 Anglophone African States.[9]

17. The Working Group hopes that its global study will result in guidance that will help Member States to regulate the growing number of private military and security companies. The national laws on such companies were analysed in the present report on the basis of the following elements: (a) scope of the legislation; (b) licensing, authorization and registration; (c) selection and training of personnel; (d) permitted and prohibited activities; (e) rules on the acquisition of weapons; (f) use of force and firearms; (g) accountability for violations and remedies for victims; and (h) ratification of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

B. Analysis

1. Commonwealth of Independent States

Scope of the legislation

18. All six countries in the present study have enacted criminal legislation to regulate private military activities, most commonly within their Criminal Code. Of the six countries, Azerbaijan, Kazakhstan, Kyrgyzstan and the Republic of Moldova expressly prohibit the formation and use of mercenaries. The term "mercenary" is not employed under the law in Tajikistan, but the prohibition on the "organization of an illegal armed formation"[10] may serve a similar purpose. Uzbekistan does not have an express restriction on the formation of private military companies, but its Criminal Code restricts participation in armed conflict or military actions for the purpose of obtaining money or personal benefits.[11]

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[3] Australia and New Zealand, along with the United States of America, are members of the Western European and Others Group in the United Nations, one of the geopolitical regional groups into which United Nations Member States have unofficially divided themselves.

[4] Costa Rica, Cuba, El Salvador, Guatemala, Honduras, Mexico, Nicaragua and Panama.

[5] Argentina, Bolivia (Plurinational State of), Brazil, Chile, Colombia, Ecuador, Peru and Uruguay.

[6] France, Hungary, Switzerland and the United Kingdom of Great Britain and Northern Ireland.

[7] Burkina Faso, Cameroon, Côte d'Ivoire, Democratic Republic of the Congo, Mali, Morocco, Senegal and Tunisia.

[8] China, India, Malaysia, Pakistan, Philippines, Singapore, Sri Lanka and United Arab Emirates.

[9] Botswana, the Gambia, Ghana, Kenya, Lesotho, Mauritius, Namibia, Nigeria, Sierra Leone, South Africa, Swaziland, Uganda and Zimbabwe.

[10] Article 185 of the Criminal Code.

[11] Section 154 of the Criminal Code.

19. Almost all of the reviewed legislation includes provisions for the particular activities related to private military companies. Moreover, in the Republic of Moldova[12] and Uzbekistan,[13] the intentional killing and infliction of bodily injury for profit or mercenary motives shall be punishable by law.

20. The scope of legislation in the countries reviewed generally covers only private security companies, although in Kazakhstan, the legislation covers both private and public security organizations. Under the law in Azerbaijan, certain public places (e.g., the National Bank, various administrative sites and oil and gas export infrastructure) may be protected only by State security services, not private security companies.[14] In Tajikistan, there do not appear to be any specific laws on private security companies. In Uzbekistan, the laws on private security companies have undergone dramatic changes since the adoption of a decree on 24 January 2014,[15] which prohibited non-governmental organizations and individuals from engaging in security activities.

Licensing, authorization and registration

21. Apart from Tajikistan and Uzbekistan, all the other countries have provided for a regulatory framework for the licensing and registration of private security services. In Azerbaijan, a licence is required to provide private security services[16] while a licence can be obtained for providing both private security services and private detective services in Kazakhstan[17] and the Republic of Moldova.[18] Laws in both Azerbaijan and the Republic of Moldova stipulate that foreign security organizations are not allowed to conduct operations within their territories; with amendments to the law on terrorism, Azerbaijan has further toughened the penalties on involvement in foreign mercenary activities.

22. In Kyrgyzstan, under the current law private organizations intending to carry out the security functions listed in the law must be established especially for that purpose.[19] The Ministry of Internal Affairs is proposing to introduce an amendment to the law which imposes stricter requirements, including provisions prohibiting those without experience in law enforcement and relevant training, as well as persons who have been convicted of crimes, suffer from mental illness and/or are addicted to alcohol or drugs, from working as private guards and requiring those responsible for such groups to have higher education. However, the amendment also proposes to replace the licensing regime with a registration procedure.

23. While most of the reviewed countries have regulatory guidelines, gaps in implementation and enforcement have been identified. These include the lack of a clear and publicly accountable body dedicated to licensing, a mechanism for monitoring the post-licensing activities of private security companies and a national registration system for such companies. The Working Group is of the view that a standard set of human rights-based criteria for licensing, a national registration system and a single expert body dedicated to licensing and monitoring the activities of private security companies are desirable to exert effective control over this industry.

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[12] Articles 151 and 152 of the Criminal Code.

[13] Chapters 1 and 2 of section one of the Criminal Code.

[14] Decree of the Cabinet of Ministers No. 32 of 7 February 2008.

[15] Regulation of the Cabinet of Ministers No. 16 of 24 January 2014.

[16] Article 17 of Law No. 266-IIIG.

[17] Article 5 of Law No. 85-II; Law No. 202-V of 16 May 2014; Government Decree No. 1421; Government Decree No. 909.

[18] Article 5 of Law No. 283-XV; articles 8 (19) and 13 (1) of Law No. 451.

[19] Article 14 of Law No. 35.

Selection and training of personnel

24. Except for Tajikistan and Uzbekistan, all the other countries have established eligibility criteria for the recruitment of private security guards.[20] A clean criminal record is standard, but some countries permit convictions for less serious crimes. For example, the laws of Kazakhstan and Kyrgyzstan bar individuals with a prior criminal record, while in Azerbaijan, only individuals with a past felony conviction are disqualified. The provisions also vary in relation to the age requirement: individuals must be at least 18 years old to qualify as a security guard in Kyrgyzstan and the Republic of Moldova while the minimum age requirements are 19 and 20, respectively, in Kazakhstan and Azerbaijan. Kyrgyzstan also excludes individuals with incapacity due to a physical or mental disability, while Azerbaijan requires Azerbaijani citizenship as well as medical evidence of the absence of psychiatric disorders.

25. Azerbaijan, Kazakhstan, Kyrgyzstan and the Republic of Moldova also provide information on the qualifications and training requirements for private security guards.[21] A special training or preparatory course is required in all four countries. In addition, Azerbaijan requires the completion of mandatory military service while in Kyrgyzstan, the training can be waived with three years of experience in law enforcement.

26. In Azerbaijan, the training course must be organized by State education centres, while in Kazakhstan and Kyrgyzstan, the training can be carried out by specialized non-State educational or training centres that have been approved and licensed by the Government. In the Republic of Moldova, certified educational institutions can conduct the qualification courses but training, retraining and accreditation must be obtained from the Ministry of Internal Affairs.

27. The analysis shows that while most countries have established a framework for the vetting and training of private security company personnel, training on human rights is not provided. The Working Group urges the mandatory inclusion of human rights in the training curricula to build awareness and respect for international standards as well as to minimize the risk of violations.

Permitted and prohibited activities

28. Among the six reviewed countries, only the legislation of Azerbaijan and Kazakhstan provide guidelines on the types of services private security companies are permitted to provide. The laws of Kazakhstan contain general and broad provisions[22] while those of Azerbaijan list the permitted services in detail.[23]

29. Regarding prohibited activities, all the reviewed laws apart from those of Tajikistan and Uzbekistan contain restrictions on private security companies. The laws of Azerbaijan, Kyrgyzstan and the Republic of Moldova focus on the protection and privacy of persons. The laws of Azerbaijan and Kyrgyzstan require private security companies to cooperate fully with the State and they may not "withhold information on committed or planned crimes from law enforcement authorities".

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[20] Azerbaijan: Law No. 266-IIG; Kazakhstan: Government Decree No. 1421; Kyrgyzstan: article 14-2 of Law No. 35; Republic of Moldova: Law No. 283-XV.

[21] Azerbaijan: Law No. 266-IIG; Kazakhstan: Government Decree No. 1126; Kyrgyzstan: Law No. 35; Republic of Moldova: article 24 of Law No. 283-XV and Government Regulation No. 667 of 8 July 2005.

[22] Article 4 of Law No. 85-II.

[23] Article 5 of Law No. 266-IIG.

30. The ambiguity concerning which activities are permitted, the difference in scope of prohibited activities and the lack of a clear dividing line between the functions of private security companies and law enforcement authorities increase the risks of ineffective control of private security company activities and potential abuse by those companies. This situation gives rise to challenges of enforcement and accountability and, in turn, to the protection of fundamental human rights and the availability of remedies for violations. It is therefore essential to enact more specific legislation regarding the role and functions of private security companies and to prohibit the involvement of company personnel in combat or military activities in order to ensure compliance with international human rights law.

Rules on the acquisition of weapons

31. Legislation in Azerbaijan, Kazakhstan, Kyrgyzstan and the Republic of Moldova contain provisions for the use of weapons by private security organizations. The legislation of all four countries includes a list of devices approved by the Government, including protective and technical equipment and lethal and non-lethal weapons. In Azerbaijan, the regulations cover both the supply of and the demand for weapons.[24]

32. In Kazakhstan, Kyrgyzstan and the Republic of Moldova, legislation stipulates licensing and registration procedures for the use of weapons by private security companies. In Kazakhstan, acquisition of "service weapons" is subject to a licence issued by the Ministry of the Interior.[25] In Kyrgyzstan, private security organizations or security and investigative departments of private enterprises may also acquire firearms subject to a licence issued by internal affairs authorities; the firearms thus acquired must be registered with the internal affairs authorities within two weeks of their purchase.[26] In the Republic of Moldova, the permits to use weapons are issued by the Ministry of Internal Affairs or local police authorities.[27] The Ministry conducts regular recertification of security personnel to determine their aptitude to use force and should such recertification fail, the Ministry may withdraw its permission and forbid the individuals in question from using force and related devices.[28]

33. On the other hand, legislation in Tajikistan and Uzbekistan contains only general provisions regarding the use of weapons. The Criminal Codes of Tajikistan and Uzbekistan both restrict activities such as the illegal production, repair, purchase, sale, carrying, keeping and transportation of weapons without due authorization;[29] the Criminal Code of Uzbekistan further specifies the types of weapons, including firearms, ammunition, explosive substances and explosive assemblies.[30]

34. There are elements of good practice in some of the laws, for example, the regulation covering both the supply of and demand for weapons in Azerbaijan, the safety standard requirements on private security company operations in Kazakhstan and the monitoring and recertification process in the Republic of Moldova. All these could be applicable in other States, and it is desirable to create a consistent and comprehensive control mechanism throughout the region. Finally, the national legislation of only two countries contains

[24] Article 7 of Law No. 422-IG of 30 December 1997.

[25] Articles 6 and 10 of Law No. 339-I of 30 December 1998; Government Decree No. 1176 of 3 August 2000.

[26] Articles 14 and 17 of Law No. 49 of 9 June 1999 (as amended); in accordance with Law No. 12 of 3 March 1997; Law No. 35; Regulation No. 532; schedules to Regulation No. 532 of 20 August 2003.

[27] Article 32 of Law No. 283-XV.

[28] Articles 31 and 32 of Law No. 130 of 8 June 2012; Schedule 4 to Regulation No. 667.

[29] Articles 195 and 196 of the Criminal Code.

[30] Article 248 of the Criminal Code.

provisions which restrict the use of weapons and impose legal consequences for their violation. It is desirable that all countries develop legal and criminal restraints on private security company personnel so as to ensure better compliance with standards under international human rights law.

Use of force and firearms

35. Only three of the six countries have enacted legislation restricting the use of force by private security personnel: Azerbaijan, Kyrgyzstan and the Republic of Moldova. The law in Azerbaijan contains general provisions concerning private security companies, whereby "special equipment", that is certain kinds of weapons and protective equipment, may be used only in "extreme circumstances".[31]

36. The laws of Kyrgyzstan and the Republic of Moldova specify the circumstances under which the use of firearms or special devices is justified: firearms may be used in defence against an impending attack that threatens human life or health, against a group attack or armed assault against protected property, to restrain individuals showing armed resistance, or to fire a warning shot in the air. Special equipment may be used only to repel immediate attacks, to restrain an offender attempting to flee from a crime scene, or when "non-violent preventive actions did not result in the desired outcome". The legislation includes procedures and mandatory actions to be taken before and after the use of force. The law of Kyrgyzstan requires every instance of firearm use to be reported immediately to local internal affairs authorities. Law in the Republic of Moldova includes further provisions: the security or law enforcement agents must issue a prior warning of the intention to use force.

37. That only three of the six analysed legal regimes contain provisions regarding the use of force by private security company personnel demonstrates that the law in this region is quite undeveloped. To protect fundamental human rights, notably the right to life and the right to security, there must be a clear distinction between the activities of private security companies and State authorities and a prohibition on the involvement of private security company personnel in combat and military activities. Legislation should also provide for any differences in what is permitted during peacetime and in the course of armed conflict as well as regulation of the involvement of foreign personnel in private security companies or in the participation of those companies in operations abroad. Finally, the provisions regarding the right to self-defence and the conditions under which the use of force is justified should be further elaborated so as to ensure that the use of force is mandated, proportional and restricted to what is necessary, in accordance with international law.

Accountability for violations and remedies for victims

38. Research reveals that in all six reviewed countries there is a government department with similar functions that is responsible for regulating the activities of private security companies; this is essentially the Ministry of Internal Affairs. In some countries, the ministries work in cooperation with another State body: the Prosecutor's Office in Kazakhstan, the Chamber of Licensing in the Republic of Moldova, the National Guard in Tajikistan and the First Deputy Prime Minister in Uzbekistan.

39. However, only four of the six countries have enacted legislation providing for regulatory measures. The laws in Kazakhstan and Tajikistan contain general provisions, stating that the regulatory bodies would conduct "surveillance"[32] and "operational-

[31] Articles 14 and 15 of Law No. 226-IIG; Regulation of the Cabinet of Ministers No. 127 of 13 August 2007 (as amended).

[32] Articles 1 (2) and 22 of Law No. 85-II; articles 1 (75-1) and (75-3) of Law No. 377-IV.

investigative activities",[33] respectively. In Kyrgyzstan and the Republic of Moldova, the legislation specifies that the regulatory bodies are entitled to perform "scheduled and unscheduled inspections" to determine compliance with licensing terms and other applicable regulation.[34]

40. All the analysed laws also contain criminal offences relating to mercenary activities. These are found in the Criminal Codes of Azerbaijan,[35] Kazakhstan,[36] Kyrgyzstan,[37] the Republic of Moldova,[38] Tajikistan[39] and Uzbekistan[40] (see Schedule 2). The sanctions mainly take the form of imprisonment (up to life imprisonment, or even a death sentence in extreme situations), but the laws vary in the types of "indirect" mercenary activities which they criminalize. Firstly, in all countries except Uzbekistan, the creation, financing or use of mercenary groups in armed conflicts entails imprisonment for between 4 and 12 years. Participation in mercenary activities carries a slightly lighter sentence of imprisonment for between 3 and 10 years, except in Tajikistan where participation in mercenary activities in an armed conflict carries the harsh sentence of 12 to 20 years' imprisonment. In three of the six countries — Kazakhstan, Kyrgyzstan and Tajikistan — the involvement in mercenary activities entailing the abuse of official powers the recruitment of young people constitute separate offences and carry a sentence of 7 to 15 years' imprisonment in all three countries.

41. Finally, three countries — Kazakhstan, the Republic of Moldova and Uzbekistan — also criminalize mercenary activities corresponding to the harm they cause. The laws provide different prison terms depending on the degree of injury to the victims, that is the infliction of bodily harm, serious harm, or intentional killing "for mercenary motives. In Kazakhstan, some mercenary activities are capital crimes.

42. In addition to the criminal offences described above, the legislation in some countries also has administrative and international elements. In Kazakhstan, violation of the procedural requirements and restrictions on private security organizations constitutes an administrative offence.[41] As for the international law elements, mercenary activity is regarded as a war crime in Azerbaijan and in Tajikistan, the intentional use of force aimed at non-combatants or that which results in murder, inhuman treatment or grave suffering in the course of an internal or international armed conflict is regarded as an intentional violation of international humanitarian law. Both are directly punishable under the Criminal Codes of these countries.[42]

43. While there is a designated body for regulating private security company activities in all the reviewed countries, the analysis reveals a lack of specific rules on the content of monitoring mechanisms, which might result in weak enforcement in practice. Most of the legislation contains similar provisions in relation to the type and nature of the criminal offences related to mercenary activity. Given the transnational nature of private military and security company activities, the Working Group is of the view that the further standardization of accountability mechanisms is desirable, so as to ensure accountability of private military and security companies regardless of the location of their operations. The general lack of legal and practical remedies for victims should also be addressed.

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[33] Law No. 45 of 12 April 1994.
[34] Kyrgyzstan: articles 3 and 6 of Law No. 35; Republic of Moldova: article 31 of Law No. 283-XV.
[35] Article 114 of the Criminal Code.
[36] Articles 170 and 267 of the Criminal Code.
[37] Articles 229 and 375 of the Criminal Code.
[38] Articles 141, 151 and 152 of the Criminal Code.
[39] Articles 185, 195, 196 and 401 of the Criminal Code.
[40] Articles 97, 104, 105 (chapter 1 of section one) and 154 of the Criminal Code.
[41] Article 470 of the Administrative Offences Code of Kazakhstan; Law No. 85-II.
[42] Article 114 of the Criminal Code of Azerbaijan; article 403 of the Criminal Code of Tajikistan.

Ratification of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries

44. Three of the six reviewed States are parties to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries: Azerbaijan, the Republic of Moldova and Uzbekistan. Azerbaijan ratified the Convention on 4 December 1997, while the accession of the Republic of Moldova and Uzbekistan took place on 28 February 2006 and 19 January 2008, respectively.

45. Although Tajikistan is not a signatory to the Convention, it is a criminal offence in Tajikistan to intentionally violate international humanitarian law.[43]

46. While some of the countries explicitly prohibit mercenary activities and have enacted criminal legislation regarding private military companies, there is very little reference to the international standards in any of the legislation reviewed. This raises concerns as to the commitment of those States to observe those standards. The Working Group urges all States parties to incorporate the standards contained in the Convention into their national legislation and encourages non-signatories to become parties, with a view to enhancing accountability mechanisms for the fuller safeguard of human rights.

2. Asia and Pacific region and North America

47. The countries in these regions analysed for the study are Australia, Nauru, New Zealand, Papua New Guinea and the United States of America.

Scope of legislation

48. The laws of all five countries cover private security companies and their activities. Generally, there is no separate legislation concerning private military companies and related services. Rather, the laws cover a variety of private security activities, from the protection and patrolling of sites to the protection and guarding of persons, though the range of activities differs.

Licensing, authorization and registration

49. In the United States, the primary entities in charge of coordinating the activities related to the licensing and registration of private military and security companies at the federal level are the Department of State and the Department of Defense.[44] Individual states may, however, adopt their own laws pertaining to registers and licensing.

50. In Australia, licensing is controlled by either the state or territory police, though the Australian Security Industry Association regulates private security activities. The Australian licensing authority is responsible for issuing and renewing security licences, monitoring the licence holders and keeping the register of licences.

51. In Papua New Guinea, the Security Industries Authority issues licences to security firms and grants permits to security officers and security guards.[45] Nauru, through the licensing authority, which is appointed by the Cabinet,[46] must also keep a register of all security licences granted.[47]

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[43] Article 40 of the Criminal Code.

[44] National Defense Authorization Act, Public Law 110-181.

[45] Security (Protection) Industry Act 2004, section 5 (1) (a).

[46] Private Security Act 2012, section 10.

[47] Ibid., section 31.

52. In New Zealand, the licences are provided by the Private Security Personnel Licensing Authority (part of the Ministry of Justice).[48] Every applicant must publish a notice of the intention to make an application, and the Authority will notify the police of every application for a licence or certificate.[49] In addition, the Authority must notify the Commissioner of Police in writing when a license/certificate is issued.[50] The Authority must hold a register of licensees and a register of certificate holders.[51]

Selection and training of personnel

53. The United States Congress established a legislative framework in the National Defense Authorization Act requiring the Department of Defense, in coordination with the Department of State, to be in charge of the licensing of private military and security companies and to prescribe regulations on the selection, training, equipping and conduct of personnel performing private security functions in an area of combat operations.[52] With regard to the training of the personnel, the geographic combatant commanders are in charge of verifying that private security company personnel meet all the legal, training and qualification requirements.[53] Contractors authorized to accompany forces are required to receive training regarding their status under international humanitarian law.[54] At the direction of Congress, the Department of Defense supported the development of a business and management standard,[55] now an international standard (ISO 18788) for private security companies, known as PSC-1, which includes training and accountability measures. Companies must implement the standard in order to compete for contracts.[56] Australia and New Zealand have also recognized and supported ISO 18788.

54. In the various state and territorial laws in Australia, a distinction is made between a licence to employ security employees and a licence to carry out a security activity. There are typically various categories of licence, depending on the kind of security activity the holder of the licence is authorized to carry out.[57] The licensing authority will grant the licence if it is satisfied that the applicant is a fit and proper person and has the competencies and experiences required. For that purpose, the applicant must have successfully completed an approved training.

[48] Private Security Personnel and Private Investigators Act 2010, section 87.

[49] Ibid., sections 27 and 48.

[50] Ibid., sections 33 and 53.

[51] Ibid., section 97.

[52] Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Public Law 111-383; National Defense Authorization Act for Fiscal Year 2010, Public Law 111-84; Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Public Law 110-417; National Defense Authorization Act for Fiscal Year 2008, Public Law 110-181. It should be noted that the National Defense Authorization Act is not a permanent piece of legislation; it is passed on an annual basis and can therefore change from year to year.

[53] Department of Defense Instruction No. 3020.50 of 22 July 2009, Procedures, part 1, section (a) (2).

[54] Department of Defense Instruction No. 3020.41 of 20 December 2011, enclosure 2 (3) (f).

[55] American National Standards Institute, Management system for quality of private security company operations-requirements with guidance, ANSI/ASIS PSC.1-2012.

[56] Office of the Assistant Secretary of Defense for Logistics and Materiel Readiness, Private security companies.

[57] For example, the Security Industry Act in the Australian Capital Territory creates five types of licence and establishes a register of those persons granted a licence, while the Act in New South Wales creates three types of licence.

55. In Papua New Guinea, any person who wishes to carry out security services must apply for a licence with the Security Industries Authority, which may issue three types of licence for security service providers.[58] A licence holder can then employ security officers or security guards, who must hold a permit that enables the licence holder to employ security officers or security guards in accordance with what is specified in the permit.[59] The Authority may grant a licence only if the applicant possesses the capabilities and experience required for the particular class of licence applied for, and if the applicant (or its director, secretary or chief executive officer in the case of a corporate body) is a fit and proper person.[60] The Authority is also entrusted by the relevant law with the mission to fix minimum standards of training and discipline governing the holders of a licence or permit and to formulate a code of conduct governing disciplinary matters.[61] The research did not reveal any code of conduct or regulation for training in Papua New Guinea.

56. In Nauru, the licensing authority will issue a licence if it is satisfied that the applicant is an adult and a suitable person.[62] In deciding upon the suitability of the applicant, the authority will consider the applicant's (or its director's executive officer's) character, financial position and any other matter prescribed by regulation.[63] The applicant must not have had a licence cancelled within the 12 months before the application is made and the applicant must not have contravened the Act within five years before the application is made.[64]

57. In New Zealand, the relevant law requires that security personnel be suitably qualified and that they not behave in ways that are contrary to the public interest.[65] The licencing authority may grant the licence/certificate only if the applicant is of or above the age of 18 years, there is no ground for disqualification and if the authority is satisfied that the applicant is suitable to carry on the class of business for which he/she has applied.

58. The licensing regime in New Zealand screens out unsuitable people, such as those with serious criminal convictions, and allows training requirements to be imposed. In October 2013, training regulations for private security personnel came into force in New Zealand and training is compulsory for both licence and certificate holders working as crowd controllers, property guards and personal guards.[66]

Permitted and prohibited activities

59. The United States limits outsourcing of "inherently governmental functions". Federal law[67] and policy[68] define the scope of those functions that only governmental personnel, and not contract employees, may perform. Inherently governmental functions

[58] Security (Protection) Industry Act 2004, section 40.
[59] Ibid., section 26.
[60] Ibid., sections 43, 44 and 45.
[61] Ibid., section 5.
[62] Private Security Act 2012, section 13.
[63] Ibid., sections 14, 15 and 16.
[64] Ibid.
[65] Private Security Personnel and Private Investigators Act 2010, section 3.
[66] Ibid., section 114.
[67] Federal Activities Inventory Reform Act of 1998, Public Law 105-270 and Federal Acquisition Regulation of 2005.
[68] Office of Management and Budget Circular A-76 and Office of Federal Procurement Policy, policy letter 11-01.

were originally defined as activities that "are so intimately related to the public interest as to require performance by Federal Government employees".[69]

60. Subsequent regulations and guidance documents[70] incorporate this language and further elaborate on the use of the term. For example, in its policy letter 11-01 the Office of Federal Procurement Policy establishes two tests for identifying inherently governmental functions: (a) the nature of the function, i.e., the exercise of sovereign powers of the United States that are governmental by their very nature, for example, arresting a person; and (b) the exercise of discretion.[71] According to the policy letter, inherently governmental functions involve, for example, the interpretation and execution of the laws of the United States so as "to significantly affect the life, liberty, or property of private persons".[72] The policy letter provides a detailed list of examples of such functions.[73] The list includes combat,[74] security operations performed in direct support of combat as part of a larger integrated armed force,[75] security operations performed in environments where, in the judgment of the responsible federal official, there is significant potential for the security operations to evolve into combat[76] and security that entails augmenting or reinforcing others (whether private security contractors, civilians or military units) that have become engaged in combat.[77]

61. According to both the federal law and the policy regulation, contractors providing special non-law enforcement security activities that do not directly involve criminal investigations, such as prisoner detention[78] and gathering information for or providing advice, opinions, recommendations or ideas to federal government officials[79] are not inherently government functions. Department of Defense Instruction No. 3020.41 states that contracted services may be utilized in applicable contingency operations for all functions not inherently governmental;[80] that inherently governmental functions and duties are barred from private sector performance;[81] and that contractors authorized to accompany the force can be utilized in such operations in a non-combat role.[82]

62. The United States Government appears to draw a line between permitted and prohibited activities of private military and security companies with reference to combat and combat-related activities, but does not specifically address "high-risk activities", which would include quite a number of functions even outside combat. Additionally, there is no clear enforcement mechanism for ensuring that agencies comply with the policy guidance on "inherently governmental functions", which is particularly worrying considering the dramatic expansion of the government contractor industry and the massive increase in the role and involvement of contractors in intelligence analysis and targeting decisions.

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[69] Federal Activities Inventory Reform Act of 1998, section 5.2 and Office of Management and Budget Circular A-76, Inventory process, B (1) (a).

[70] Federal Acquisition Regulation and Office of Federal Procurement Policy, policy letter 11-01.

[71] Office of Federal Procurement Policy, policy letter 11-01, section 5-1 (a) (1) (i) and (ii).

[72] Ibid., section 3, Definitions, (a) (3).

[73] Ibid., appendix A.

[74] Ibid., appendix A (4).

[75] Ibid., appendix A (5) (a).

[76] Ibid., appendix A (5) (b).

[77] Ibid., appendix A (5) (c).

[78] Federal Acquisition Regulation, section (d) (19) and Office of Federal Procurement Policy, policy letter 11-01, appendix B (9).

[79] Office of Federal Procurement Policy, policy letter 11-01, section 3 (b) (1).

[80] Department of Defense Instruction No. 3020.41, enclosure 2, section (1) (a) (1).

[81] Ibid., section (2) (e).

[82] Ibid.

63. The assumption that private military and security company contractors do not carry out inherently government functions relating to combat or direct participation in hostilities is further supported by the legislation, which notes that contractor personnel accompanying the United States armed forces or and in a designated operational area or supporting a diplomatic or consular mission outside the United States, are civilians.[83] At the same time, United States legislation also stipulates that contractors authorized to accompany the force, if captured during international armed conflict, are entitled to prisoner of war status.[84]

64. In Australia, it is usually prohibited, among other things, to employ security persons without a proper licence, to carry out a security activity without a proper licence, or if the licence has been suspended or revoked, to contravene any condition of a licence, to advertise security activities without being the holder of a licence, to abuse the authority conferred by the licence and to refuse to produce the licence to a police officer or any person with whom the licensee has dealings when carrying out security activity.[85]

65. In some cases, the research found references in the Australian legislation to the involvement of law enforcement personnel in private military and security company-related activities. For example, in the Australian Capital Territory, Commonwealth officers, such as members of the defence force and protective service officers, are not bound by the Security Industry Act.[86] Also, in New South Wales, the provisions of the law do not apply to members of the "armed forces" of the Commonwealth, another state or a territory.[87]

66. In Papua New Guinea, it is prohibited for a person to operate or receive security services without a licence, employ a person without a permit or provide false or misleading information in an application for a licence or permit.[88] Further, if the holder is convicted of an offence punishable by a term of imprisonment of two years or longer and, as a result of the conviction, is sentenced to death or imprisonment, or if he/she is found guilty on a complaint for which the penalty of cancellation of a licence is recommended by the Board of Complaints, the licencing authority can cancel the licence.[89] The relevant act includes no provisions on the participation of law enforcement agents in the activities of private security companies.

67. In Nauru, it is a criminal offence under the law to conduct a security activity without a security licence, to operate a security firm and employ persons who do not hold a security licence, to fail to comply with a condition of a security licence, to fail to produce a licence when asked to do so by a police officer, and to fail to inform the licensing authority of any change of detail in the licence or application.[90] Further, a public officer cannot carry out the duties of a security officer, bodyguard or crowd controller or perform security firm-related activities.[91]

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[83] Code of Federal Regulations, title 48, chapter 2, section 252.225-7040 (2011 edition), Contractor personnel authorized to accompany United States armed forces deployed outside the United States, section (b) (3) and Federal Acquisition Regulation 52.225-19, Contractor personnel in a designated operational area or supporting a diplomatic or consular mission outside the United States, section (b) (iii).

[84] Department of Defense Instruction No. 3020.41, enclosure 2, section (1) (a) (1.

[85] Pursuant to section 10 of the Australian Capital Territory Security Industry Act 2003 and section 29B of the New South Wales Security Industry Act 1997.

[86] Security Industry Regulation 2003, Part 2 of section 6.

[87] Security Industry Act, section 6 (2).

[88] Security (Protection) Industry Act 2004, sections 50, 51 and 52.

[89] Ibid., section 46.

[90] Private Security Act 2012, sections 24-29.

[91] Ibid., section 5.

68. In New Zealand, any person who conducts a private security business without a licence is subject to a fine.[92] The relevant act provides for specific responsibilities of licensees and certificate holders, including the requirement to wear an identification badge, the obligation to keep records, to allow access to those records by the police and the Complaint, Investigation and Prosecution Unit and to inform the licensing authority of any change to the licence/certificate holder's name or residential address and of any ground for disqualification subsequent to the application. Failure to comply with any of these obligations would constitute a criminal offence.[93]

Rules on the acquisition of weapons

69. In the United States, the Arms Export Control Act governs the export and import of specific defence-related articles and services, including private security company services,[94] while the International Traffic in Arms Regulation requires that private military and security companies that do business abroad and that wish to ship and use certain weapons, protective equipment or electronics in connection with their business obtain export licences. In Australia, a range of laws ensure the implementation of the respective arms-related international treaties;[95] these are further complemented by the Export Control Act 1982, which imposes strict requirements on companies and individuals wishing to export weapons. Finally, the Weapons of Mass Destruction (Prevention and Proliferation) Act 1995 requires a specific ministerial permit for the export of any goods or services to another country.

Use of force and firearms

70. In the United States, with respect to situations in which force can be used, "contractor personnel shall not be authorized to possess or carry firearms or ammunition during applicable contingency operations,"[96] except for cases "where the civil authority is either insufficient or illegitimate, and the commander determines it is in the interests of the Government to provide security, because the contractor cannot obtain effective private security services; such services are unavailable at a reasonable cost; or threat conditions necessitate security through military means".[97]

71. United States law also specifies that contractor personnel accompanying the United States armed forces or/and in a designated operational area or supporting a diplomatic or consular mission outside the United States are authorized to use deadly force only in self-defence[98] and when such force reasonably appears necessary to execute their security mission to protect assets/persons.[99] In addition, Department of Defense personnel shall use only the amount of force reasonably necessary to carry out their duties;[100] force must be reasonable in intensity, duration and magnitude;[101] and deadly force is justified only under

[92] Private Security Personnel and Private Investigators Act 2010, section 23.
[93] Ibid., Part 3, sections 65-71.
[94] Arms Export Control Act, section 2778.
[95] Crimes (Biological Weapons) Act 197; Nuclear Non-Proliferation (Safeguards) Act 1987; Chemical Weapons (Prohibition) Act 1994.
[96] Department of Defense Instruction 3020.41, enclosure 2, section 3 (k).
[97] Ibid., section 4 (e).
[98] Code of Federal Regulations, title 48, chapter 2, section 252.225-7040 (2011 edition), section (b) (3) (i); Federal Acquisition Regulation 52.225-19, section (b) (ii) (B) (3) (i).
[99] Code of Federal Regulations, title 48, chapter 2, section 252.225-7040, section (b) (3) (ii); Federal Acquisition Regulation 52.225-19, section (b) (ii) (B) (3) (ii).
[100] Department of Defense Directive No. 5210.56 of 1 April 2011, enclosure 2, section 2 (a).
[101] Ibid., section (2) (b).

conditions of necessity and may be used only when lesser means cannot be reasonably employed or have failed and the risk of death or serious bodily harm to innocent persons is not increased by its use.[102]

72. As for control over the use of force, United States regulations require an evaluation of the necessity to arm personnel with consideration being given to the possible consequences of accidental or indiscriminate use of those arms.[103] Another regulation provides that while Department of Defense civilian personnel engaged in security and law and order activities shall be appropriately armed and have the inherent right to self-defence,[104] arming Department of Defense personnel with firearms shall be limited and controlled and shall be limited to missions or threats and the immediate need to protect Department of Defense assets or persons' lives.[105]

73. With regard to further preconditions for the use force, contractor personnel can be armed for individual self-defence only on the basis of applicable United States, host nation or international law, relevant status-of-forces agreements, international agreements or other arrangements with local authorities and on a case-by-case basis[106] and if weapons familiarization, qualification and briefings regarding the rules for the use of force have been provided.[107] According to United States rules, each geographic combatant commander shall develop a system of verifying that private security company personnel meet all the legal, training and qualification requirements for authorization to carry a weapon.[108] The permission process is run by the appropriate Staff Judge Advocate on a case-by-case basis.[109]

74. Contractors designated to support a diplomatic or consular mission outside the United States are also authorized to carry weapons and have to be adequately trained to carry and use them,[110] with full understanding of, and adherence to, the rules for the use of force issued by the Combatant Commander or the Chief of Mission,[111] in compliance with applicable agency policies, agreements, rules and regulations and other applicable law.[112] In cases where all private security companies need to be armed, the relevant rules set out very detailed procedures and documentation on individual training, covering weapons familiarization and qualification; rules for the use of force; limits on the use of force, including whether defence of others is consistent with host nation status-of-forces agreements or local law; the distinction between the rules of engagement applicable to military forces and the prescribed rules for the use of force that control the use of weapons by civilians; and the Law of Armed Conflict.[113]

75. In addition, personnel authorized to be armed shall be thoroughly briefed on their individual responsibilities and shall receive mandatory training.[114] Moreover, security, law enforcement or other designated personnel who routinely engage in duties or activities are required to attend a complete Department of Defense component-approved training every

[102] Ibid., section (4) (b).
[103] Ibid.
[104] Ibid., section 4 (a).
[105] Ibid., section 4 (b).
[106] Department of Defense Instruction 3020.41, 4 (e) (2) (a).
[107] Ibid., 4 (e) (2) (b).
[108] Department of Defense Instruction 3020.50, enclosure 3, Part 1 (a) (2).
[109] Ibid., enclosure 3, Part 1 (a) (3).
[110] Federal Acquisition Regulation 52.225-19 (h) (3) (i).
[111] Ibid., (h) (3) (i) (B).
[112] Ibid., (h) (3) (i) (C).
[113] Department of Defense Instruction 3020.50, enclosure 3, section 1 (a) (2) and (3) (d).
[114] Ibid., enclosure 2, section 1 (b) (2).

12 months, including firearms familiarization, live-fire qualification and use-of-force training. The legislation also notes that the inappropriate use of force could subject contractors to United States and local host nation prosecution and civil liability.[115] For example, unless immune from host nation jurisdiction by virtue of an international agreement or international law, inappropriate use of force by contractor personnel authorized to accompany the United States armed forces can subject such personnel to United States or host nation prosecution and civil liability.[116]

76. In Australia, all state and territorial police departments maintain registries of firearm ownership within their respective jurisdictions,[117] and states and territories have introduced restrictions on firearms and firearms storage requirements. For example, New South Wales, South Australia, Tasmania and Western Australia allow the holder of a specific category of licence to carry firearms, but only if the licensee is duly authorized under the applicable firearms legislation.[118]

77. In Papua New Guinea, the licensing authority determines whether circumstances justify carrying or using a firearm. The holder of a class A security operators licence or a security officer may apply to the Registrar for the issue of a firearm licence. Except for this specific provision, the relevant act[119] expressly provides that a licence for a firearm shall not be issued to any person licensed under the act.[120]

C. Accountability and remedies

78. In the United States, the Military Extraterritorial Jurisdiction Act extends federal criminal jurisdiction to certain defence contractor personnel and to contractors hired by other agencies that support the Department of Defense in connection with criminal offences committed outside United States territory.[121] If a contractor in a designated operational area, or supporting a diplomatic or consular mission, is involved in conduct outside the United States that would constitute an offence punishable by imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States, while employed by or accompanying the armed forces, he/she may be subject to the criminal jurisdiction of the United States.[122] The Secretary of Defense may designate and authorize any person serving in a law enforcement position in the Department of Defense to arrest any such person outside the United States.[123] However, this provision leaves a significant gap in extraterritorial criminal jurisdiction because it does not cover all contractors working for other agencies, such as the Department of State.

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[115] Department of Defense Directive No. 5210.56, section 4 (e) (2) (c).

[116] Code of Federal Regulations, title 48, chapter 2, section 252.225-7040 (2011 edition), section (b) (3) (iii).

[117] Tim McCormack, *PRIV-WAR Report – Australia: Australian Report on National Legislation and Judicial Practice*, 2009, p. 7.

[118] See, for New South Wales, Firearms Act No. 23 of 1996, sections 16C and 48; for South Australia, Firearms Act 1977, sections 10-12; for Tasmania, Firearms Act No. 23 1996, sections 18 (c), 33, 37, 85 and 86; and for Western Australia, Firearms Act 1973, section 16A.

[119] Security (Protection) Industry Act 2004.

[120] Ibid., section 71.

[121] Military Extraterritorial Act, United States Code, title 18, sections 3261-3267.

[122] Military Extraterritorial Jurisdiction Act, United States Code, title 18, sections 3261 ff; Code of Federal Regulations, title 48, chapter 2, section 252.225-7040 (2011 edition), section (e) (vii) (B) (2) (i).

[123] Military Extraterritorial Act, United States Code, title 18, section 3262.

79. Federal criminal jurisdiction also extends to conduct that is determined to constitute a war crime when committed anywhere in the world, by or against a United States national or a member of the United States armed forces.[124] It also applies to the offences of recruitment or use of child soldiers, genocide, homicide, torture or trafficking in persons committed by a national of the United States within the special maritime and territorial jurisdiction of the United States.[125]

80. The Uniform Code of Military Justice was also amended to expand the United States military's authority to prosecute crimes committed by civilians serving with or accompanying the armed forces to include civilians serving in a "contingency operation".[126] It should be noted, however, that the constitutionality of this provision has not been fully tested, as the United States Supreme Court has in the past expressed significant concerns about trying civilians in military courts.[127]

81. In Australia, the legislation on criminal accountability pertains in certain limited circumstances to private military companies by extending the application of Australian criminal law to civilians (whether they are Australian nationals or residents or not) accompanying the Australian forces abroad, or to Australian nationals or residents engaged by an Australian governmental agency to undertake tasks in countries outside Australia. For example, the Defence Force Discipline Act 1982, which provides in principle the legal framework for the Australian military, establishes a process for the extension of the Australian criminal law to civilians, including private contractors that accompany the armed forces on missions abroad.

82. Under the Australian law, contractors of the Department of Defence can be considered "defence civilians"; their criminal acts committed abroad are covered by the extraterritorially applicable Australian criminal law and they can be prosecuted for such acts by Australian courts.[128] As a result of the amendment to the Crimes (Overseas) Act 1964, even criminal acts committed on mission by private security or military contractors hired by government agencies other than the Department of Defence are covered by Australian criminal law.[129] The Crimes (Overseas) Act covers bodies corporate as well as individuals, which means that an Australian private military or security company carrying out activities in a foreign country could be subject to criminal prosecution.

83. The Working Group believes that private military and security companies contracted by the Government of Australia should be held accountable for human rights violations, even if they occur outside Australian territory. The Australian legislation on civil liability for the activities of private military companies and private security companies and/or the actions of their personnel is minimal. Australian contract law may well apply extraterritorially in the sense that parties can enter into a binding contract in Australia for services provided overseas, and any alleged breach of the contract can be litigated in Australian courts. However, tortious liability in Australia does not extend extraterritorially in the absence of a specific legislative provision to that effect.[130]

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[124] War Crimes Act, United States Code, title 18, section 2441.

[125] United States Code, title 18, sections 1091, 1111, 2340-2340B and 2442; Code of Federal Regulations, title 48, chapter 1 (2000 edition), sections 22-1700-22.1704.

[126] Uniform Code of Military Justice, United States Code, title 10, sections 801-946.

[127] See, e.g., *Toth v. Quarles* (1955).

[128] Defence Force Discipline Act 1982, sections 9 and 61.

[129] Crimes (Overseas) Act 1964, section 3.

[130] McCormack, *PRIV-WAR Report – Australia*, p. 14.

84. In New Zealand, the licensing authority is also in charge of the discipline of the licensees and certificate holders. A complaint can be filed with the authority against a licensee or a certificate holder, on at least one ground for disqualification or cancellation. This may apply if the licensee or certificate holder has contravened any provision of the relevant act or regulations, or if he/she has been guilty of misconduct or gross negligence, if a false statement was made in the application or if he/she has failed to meet one of the responsibilities stipulated in the act.[131]

85. The authority will consider the complaint and, if it decides to investigate, may refer the complaint to the police or to the Complaints, Investigation and Prosecution Unit.[132] The authority may take interim action and suspend a licence or certificate if this is in the interest of the public and if further loss or damages may be caused if the licence/certificate is not suspended.[133] A disciplinary hearing will be held and, if the authority is satisfied that the grounds of the complaint have been proved, it may cancel the licence or take other measures that it deems appropriate, such as suspending the licence, requiring training, stipulating additional conditions for the licence, levying a fine or issuing a reprimand.[134] The licence or certificate may be cancelled by the authority on mandatory grounds, if at any time a ground for disqualification applies or if the licence was issued by mistake or by reason of fraud on the part of the applicant,[135] or on discretionary grounds.[136]

86. In Papua New Guinea, the relevant law also provides for a Board of Complaints, which shall inquire into any complaints against a licensee.[137] The act also provides for disciplinary actions against a licensee for improper conduct, which may be initiated by the authority itself or any other person and will be decided upon by the Board.[138] The Board may impose penalties, such as a reprimand, the suspension or cancellation of the licence or the permit, or attributing disciplinary points against the licensee.[139]

87. The legislation of Nauru contains no provisions with regard to accountability and reporting; the only criminal offences are those that the law relates to the conduct of security activity without a licence or those not in compliance with the licence.[140]

Ratification of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries

88. Australia, Nauru, Papua New Guinea and the United States have not ratified the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. New Zealand and Australia are the only countries that have enacted national laws relating to mercenary activities. With the exception of Papua New Guinea and the United States, all other States have ratified Protocol I Additional to the Geneva Conventions of 12 August 1949.

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[131] Private Security Personnel and Private Investigators Act 2010, sections 73 and 74.
[132] Ibid., section 75.
[133] Ibid., section 76.
[134] Ibid., section 78.
[135] Ibid., sections 79 and 82.
[136] Ibid., sections 80 and 83.
[137] Security (Protection) Industry Act 2004, sections 57 ff.
[138] Ibid., sections 53 ff.
[139] Ibid., section 61.
[140] Private Security Act 2012, sections 24-29.

IV. Conclusions and recommendations

89. The research reveals that while each of the six countries that were part of the former Soviet Union has legislation that directly or indirectly regulates private security companies, each country approaches the regulation of those companies differently. There is a general regulatory emphasis on formal and procedural conditions, each country having a set of detailed criteria for the licensing, registration, selection and training of private security companies and their personnel; however, there is little provision for substantive requirements, with no reference to human rights or any international standards. Along with the general lack of mechanisms for the implementation and enforcement of the relevant regulations, the private security industry is in practice subject to relatively loose control.

90. The study also demonstrates that despite detailed provisions on permitted and prohibited activities, the acquisition of weapons and the use of force, the different roles and functions of private security companies and those of law enforcement authorities remain ambiguous. These regulatory gaps pose risks of violation of both national laws and international humanitarian law. In view in particular of the transnational tendencies of private security companies and the general lack of extraterritorial application of legal instruments, there is little protection of fundamental human rights such as the right to security, the right to life, the prohibition of arbitrary deprivation of liberty, the prohibition of torture and cruel, inhuman or degrading treatment and the right of victims to effective remedies.

91. Regarding the accountability of private military and security companies and their personnel, the analysis reveals that the reviewed legislation lacks specific rules on inspections and monitoring mechanisms, with no single publicly accountable body dedicated to the regulation and control of private military and security company activities. The different countries have slightly varying penal systems for human rights violations by private military and security company personnel, but there is a general lack of remedies for the victims of such violations. The standardization of accountability and enforcement mechanisms can create a comprehensive network of accountability throughout the region, ensuring compliance with international human rights law and international humanitarian law.

92. Concerning the review of Australia, Nauru, New Zealand, Papua New Guinea and the United States of America, the study reveals that each country approaches the privatization of the security industry differently, creating regulatory gaps in some respects. The analysed countries focus on the protection provided to persons and goods in the domestic sphere and the majority of the countries do not specifically address private military companies, the issue of military and security services provided abroad or the extraterritorial applicability of the legislation. Only two out of the five countries prohibit mercenarism in their national legislation.

93. In general, the five countries have detailed regulations on licensing and authorization of private security services as well as on the selection criteria for the personnel, but fewer rules could be found on the content of the training of private military and security company staff. The analysis shows that only one of the five countries analysed has legislation that includes some reference to international humanitarian law in the selection criteria or in the training materials.

94. Further, none of the countries has specific rules on the direct participation of private military and security companies in hostilities, while only one defines and lists "inherently government functions" which are strictly reserved for government personnel and cannot be exercised by private security or military contractors.

Additionally, few States make even limited references to the involvement of law enforcement agents in the activities of private military and security companies and very few references were found to specific rules on the export of weapons and firearms by company personnel. The use of force is regulated in detail by only one of the countries reviewed.

95. The Working Group notes that while some of the reviewed countries have demonstrated commitment to the international legal instruments related to mercenaries, the research reveals very limited reference to international standards in their domestic laws. The Working Group calls on those countries that are parties to the international instruments on mercenaries to incorporate the international standards into national legislation and to introduce relevant enforcement and accountability mechanisms. The Working Group also encourages signatory countries to ratify, and the remaining States to become parties, to the relevant instruments.

96. The Working Group reiterates its view that a comprehensive, legally binding international regulatory instrument is the best way to ensure consistent regulation worldwide and adequate protection of the human rights of all affected by the activities of private military and security companies. An international convention would provide a standard regulatory framework for various essential issues related to the activities of private military and security companies and a single dedicated body would ensure the accountability of these companies' personnel in guaranteeing the right to effective remedies of all victims worldwide.

97. The Working Group also encourages Governments in the various regions it has reviewed to promote discussion on the role of private security companies in the context of regional security, as part of the agendas of intergovernmental, regional and subregional organizations.